UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MVM, Inc.

Employer

and Case 5-RC-16383

UNITED SECURITY AND POLICE OFFICERS
OF AMERICA (USPOA)

Petitioner

and

INTERNATIONAL UNION, SECURITY, POLICE AND FIRE
PROFESSIONALS OF AMERICA (SPFPA)

Intervenor

Gregory R. Sharma-Holt, Esq., for the Petitioner.
Scott A. Brooks, Esq., for the Intervenor.
Anthony L. Sims, Labor Relations Manager, for the Employer.

ADMINISTRATIVE LAW JUDGE'S REPORT AND
RECOMMENDATIONS ON OBJECTIONS

BRUCE D. ROSENSTEIN, Administrative Law Judge. Pursuant to a petition filed on November 3, 2009[1] and a Stipulated Election Agreement entered into by the parties and approved on November 19, a mail-ballot election was conducted with the ballots being mailed to the eligible voters on Tuesday, June 29, 2010.[2] The ballots were commingled and counted on Tuesday, July 20, 2010, in the below described unit of employees.

> INCLUDED: All full-time and regular part-time security officers employed by the Employer and assigned to the following locations of the National Institutes of Health operations: Bethesda, Poolesville, Gaithersburg, Rockville, and

[1] All dates are in 2009 unless otherwise indicated.

[2] A pending unfair labor practice charge filed by the Intervenor blocked the initial scheduling of an election. By letter dated March 22, 2010, the Regional Director dismissed the charge in case 5-CB-10763.

Baltimore, Maryland, pursuant to its current and follow-on service contracts with the government for the provision of security services at said facilities.

EXCLUDED: All office and clerical employees, managers, professional employees, temporary employees, substitute employees, non security employees, and supervisors as defined in the Act.

The tally of ballots, which was made available to the parties showed:

Approximate number of eligible voters	373
Void ballots	15
Votes cast for Petitioner	153
Votes cast for Intervenor	55
Votes cast against participating labor organization	4
Valid votes counted	212
Challenged Ballots	21
Valid votes counted plus challenged ballots	233

Challenges were not sufficient in number to affect the results of the election.

On July 27, 2010, the Intervenor filed timely objections to conduct affecting the results of the election. On August 11, 2010, the Regional Director issued a Report on Objections and Notice of Hearing finding that substantial and material issues of fact have been raised regarding Objections 5 and 6 that can best be resolved by record testimony (Bd Exh. 1(j)). Accordingly, the Regional Director determined that a hearing should be held regarding those Objections.

I conducted a hearing on the below noted objections in Washington D.C. on August 25, 2010. On the entire record, I make the following recommendations.[3]

THE OBJECTIONS

Objection 5

The Intervenor alleges that approximately 85 percent of the bargaining unit members were born in Africa and that the Petitioner campaigned by making statements and promises that appealed to voters born in Africa. The Intevenor asserts that the Petitioner made a promise during the course of the election campaign that if the Petitioner was elected, the local executive board would be comprised of members who were from Africa.

Facts

Security Officer Lunette Griffin, who testified on behalf of the Intervenor regarding this issue, overheard a conversation in November 2009 between co-worker Adedayo Adewoley[4] and several employees (Wilbert Tebo, Fidelis Njinkens and Uzoma). Adewoley told the assembled

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[3] The undersigned will consider the alleged interference that occurred during the critical period, which begins on and includes the date of the filing of the petition and extends through the election.

[4] According to Griffin, Adewoley came to her in November 2009 just after the Intervenor had kicked him off the executive board and he stated that the next executive board should be all African and one Caucasian.

employees that he wanted a local executive board comprised of African born black employees and one Caucasian rather than the present executive board that has a number of American born black employees. In December 2009, Griffin overheard another conversation that occurred in Building 38 near the supervisors' area wherein Adewoley again expressed his preference to the above noted employees for a local executive board mainly comprised of African born black employees.[5]

Griffin further testified that in July 2010, prior to the ballot count, a number of bargaining unit employees accused her of making national origin and racial statements and they did not appreciate her causing problems by talking about these issues during the election campaign. Additionally, Griffin noted that approcimately13-17 employees who worked in the Gateway unit building also accused her of making statements about national origin and race during the July 2010 time period.

Security Officer Jerry Bell testified that a majority of the bargaining unit employees were dissatisfied with the representation that had been provided by the Intervenor and wanted them voted out as their collective-bargaining representative. He further noted that he was not aware of any racial issues that occurred during the critical period and only learned about the national origin and racial allegations after the Intervenor filed its Objections to the election.

Security Officer Anderson Sibedwo testified that he had an argument with Griffin several days before the ballot count due to her not representing him one year ago regarding a personal issue at a time that she served as vice-president of the Intervenor.

Assane Faye, Executive Director and National President of the Petitioner, testified that local unions are permitted to elect an executive board comprised of bargaining unit members in accordance with its by-laws (Pet. Exh. 1). In this regard, Article 7, Section 5.2, requires all local elections to be by secret ballot.

Discussion

The Board applies an objective test in evaluating party conduct during an elections critical period, i.e. whether the conduct has the "tendency to interfere with the employees' freedom of choice" and "could well have affected the outcome of the election." *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995).

In *Sewell Mfg. Co.*, 138 NLRB 66, 71-72 (1962), the Board stated that it would not set aside an election on the basis of racial appeals where a party limits itself to truthfully setting forth another party's position on matters of racial interest and "does not deliberately seek to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals." Cases since *Sewell* have shown that this "rule . . . is applicable only in those circumstances where it is determined that the appeals or arguments can have no purpose except to inflame the racial feelings of all voters in the election."

In *NLRB v. Schapiro & Whitehouse, Inc.*, 356 F.2d 675 (4th Cir. 1966), the Fourth circuit applied *Sewell* to union propaganda. The court found that campaign literature distributed by a union on two occasions shortly before a consent election which urged employees, most of

[5] In the December 2009 conversation, according to Griffin, Adewoley informed the group of employees that Griffin was a liar, that she had him kicked off the executive board, and the next board should have predominantly all African and one Caucasian member.

whom were Black, to consider and act on race as a factor in the election was so inflammatory as to invalidate the election. In doing so, the court specifically approved the *Sewell* standards.

As in the case of employer inflammatory racial appeals (for example, *Allen-Morrison Sign Co.*, 138 NLRB 73 (1962), so in union inflammatory appeals, factual distinctions may call for a different result. Thus, while the theme in *Archer Laundry Co.*, 150 NLRB 1427 (1965), was admittedly based on a racial issue, distinguishing implications were found. Instead of racial appeals designed to engender race hatred, the appeals in *Archer* were regarded as designed to engender "racial self-consciousness."[6] See also, *Aristocrat Linen Supply Co., 150 NLRB 1448 (1965); The Coca-Cola Bottling Co. of Memphis,* 273 NLRB 444; and *Pacific Micronesia Corporation d/b/a Dai-Ichi Hotel Saipan Beach,* 326 NLRB 458 (1998).

Under these circumstances, and particularly noting that the statements and promises made in the subject case were not appeals designed to engender race hatred, I find that no objectionable conduct occurred. Moreover, Griffin's testimony did not establish that the Petitioner promised that if elected the local executive board would be comprised of members from Africa. Rather, Griffin testified that an employee who supported the Petitioner expressed to several co-workers that he wanted or preferred an executive board of members from Africa. Further, the record testimony reveals that as an underlying current running throughout the critical period was animosity directed toward the Intervenor for not adequately representing the interests of the collective-bargaining unit. I also note the discord that existed between certain employees in the bargaining unit and Griffin that apparently led to her removal as Vice President of the Intervenor just after the ballot count. In my opinion, this is what led to some of the statements that were made by bargaining unit employees, none of whom were officers or officials of the Petitioner, regarding cultural issues including certain voters' national origin.

With respect to the Intervenors assertion that statements were made to voters that if the Petitioner was elected the local executive board would be comprised of members who were from Africa, I find for the following reasons that no objectionable conduct has been established. In this regard, I find bargaining unit employees expressions of who they would prefer on a local executive board not to be racially motivated and that members' of Petitioner's executive board must be duly elected by the membership and are not appointed by the leadership.[7] Likewise, the Board found in *Tio Pepe, Inc.*, 263 NLRB 1165 (1982), relying on the holding in *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 278-79 (1973), that when offers of financial benefit are made in exchange for union support, a union engages in objectionable conduct requiring the results of an election to be set aside. Here, however, even assuming that the Petitioner made statements to voters that the local executive board would be comprised of members who were from Africa, no offers of financial benefit were undertaken and the selection of individuals to the executive board is made under the auspices of an election by secret ballot.

For these reasons, I find that the Intervenor has not conclusively established the underpinnings of Objection 5, and recommend that it be overruled.

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[6] In *NLRB v. Sumter Plywood,* 535 F.2d 917 (5th Cir. 1977), the Court held that some degree of "consciousness raising" was acceptable for organizing among historically economically disadvantaged ethnic groups and noted that because the election was 156-77, the improprieties alleged were insufficient to show a material affect on the election.

[7] It stands to reason that if 85 percent of the unit was comprised of employees born in Africa, and the Petitioner won the election, there is a strong likelihood that the executive board would be comprised of members who were from Africa.

Objection 6

The Intervenor alleges that the Petitioner collected voters' mail-ballots for delivery to the Regional Office.

Facts

Hope McKnight, a three year security officer and member of the collective-bargaining unit,[8] is assigned to the NIH Bethesda, Maryland, complex where she regularly monitors radio transmissions, checks employee ID cards, and provides protection and security for the complex.

McKnight testified that sometime in April or May 2009, while working a weekend shift, co-worker Bell approached her and inquired whether she had received a ballot from the Board for the upcoming election. McKnight replied that she had received the ballot but did not particularly know how to fill it out and requested Bell to assist her in doing so. McKnight testified that Bell suggested that she check the middle box.[9] According to McKnight, after signing the outside of the ballot envelope, she gave it to Bell who sealed the envelope. She then observed Bell giving the envelope to someone in the inner patrol booth. McKnight does not know what happened to the ballot but acknowledged that she did not observe Bell collecting any other ballots from prospective voters.

Bell is a seven year security officer and member of the collective-bargaining unit who served as an observer for the Petitioner at the ballot count on July 20, 2010.

Bell testified that he spoke with McKnight over a weekend that they both worked prior to the July 20, 2010 ballot count. Upon arriving at work to commence her Saturday shift, McKnight asked Bell how to fill out the ballot which she intended to do later that evening. On Sunday, McKnight arrived at work with her ballot filled out, sealed, and signed. Bell testified that McKnight requested that he take her signed ballot after he mentioned that he was going to the mailbox to mail some of his bills. Bell then went directly to the street corner where he deposited his bills and the ballot in the USPS mailbox.

Griffin testified that in July 2010, while in the cafeteria, she heard co-worker Fidelis Kemngang ask Security Officer Andre Kamleu whether he filled out the ballot for the upcoming election and if he had the ballot with him. Kamleu replied that he had the ballot with him and gave it to Kemngang. Griffin then observed Kemngang take the ballot and deposit it in the USPS mailbox just outside the facility. Griffin further testified that she heard that other co-workers had given their ballots to fellow security officers but she could not identify how many times this occurred or how many ballots were involved. McKnight admitted that she did not observe any other employees collecting ballots and had no personal knowledge if they occurred.

Discussion

It is well settled that the Board, in conducting elections, must maintain and protect the integrity and neutrality of its procedures. See, e.g. *Family Service Agency, San Francisco,* 331 NLRB 571 (2000); *Glacier Packing Co.,* 210 NLRB 571 (1974).

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[8] The Intervenor presently represents the bargaining unit and will remain the exclusive representative pending the resolution of the subject Objections.

[99] Jt. Exh. 1 shows that the first box on the ballot was for the Intervenor while the second box represented a vote for the Petitioner.

In mail-ballot elections, of course, a Board agent is not present, when the ballots are marked and returned by mail. For this reason, mail ballots are accompanied by election kits that clearly specify the precise procedure for casting and returning the ballot. Where such procedures are not followed, and the mail ballots come into the possession of a party to the election, the secrecy of the ballot and the integrity of the election process are called into question.

The Board, in the case of *Fessler & Bowman, Inc.*, 341 NLRB 932 (2004), addressed a similar issue to the one raised in the subject Objection. The four Board Members that participated in the case unanimously held that when mail-ballot collection by a party occurs, it casts doubt on the integrity of the election process and undermines election secrecy. Accordingly, the Board found that where a party collects or otherwise handles voters' mail-ballots, that conduct is objectionable and may be a basis for setting aside the election.

The misconduct in the *Fessler & Bowmann* case involved the collecting of mail-ballots for two employees' who had completed the election kit process. Members Liebman and Walsh opined that the relevant inquiry is whether the objectionable conduct had a tendency to interfere with the employees' freedom of choice and "could well have affected the outcome of the election."

In that case, unlike the facts presented here, the two collected mail-ballots could have numerically affected the election results. Under those circumstances, the case was remanded to the Regional Director to resolve the issue. In this case, since the record evidence only establishes that two mail-ballots were collected and even if the votes were changed from the Intervenor to the Petitioner, it still would not have changed the results of the election.[10]

For all of the above reasons, I find that the Intervenor has not conclusively established the allegations in Objection 6, and therefore, I recommend that it be overruled.

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[10] The facts in the subject case further persuade me that Objection 6 should not be sustained. In crediting Bell rather than McKnight, and noting that Griffin testified similarly, the technical collection of the ballot should not be controlling here as they both were immediately deposited in the mailbox without any evidence of tampering. Bell was a convincing and credible witness in comparison to McKnight who mistakenly placed her conversation with Bell in April or May 2009, a period prior to the filing of the representation petition when no ballots were available. McKnight during the course of her testimony was unsure of when events occurred and how she obtained the second election ballot. Moreover, as discussed above, the Intervenor only produced conclusive evidence that two ballots out of 212 valid votes counted were collected, a number insufficient to impact the results of the election that the Petitioner won with almost a 3 to 1 margin.

Conclusions and Recommendations to the Board

Based on my findings and conclusions above, I recommend that the Board overrule Objections 5 and 6 and issue a Certification of Representative to the Petitioner.[11]

Dated, Washington, D.C. September 20, 2010

Bruce D Rosenstein

Bruce D. Rosenstein
Administrative Law Judge

[11] Pursuant to the provisions of Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, within 14 days from the date of issuance of this Recommended Decision, either party may file with the Board in Washington D.C. an original and eight copies of exceptions thereto. Exceptions must be received by the Board in Washington by, October 4, 2010. Immediately upon the filing of such exceptions, the party filing same shall serve a copy upon the other parties and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board may adopt this Recommended Decision.